No. 20458

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * *

DOMINIC PETER GAGLIARDO,	)
	)
Appellant,	)
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Appellee.	)
	)

APPELLEE'S SUPPLEMENTARY BRIEF

JOSEPH L. WARD
United States Attorney

MICHAEL DeFEO
Special Assistant United States Attorney

305 Post Office Building
Las Vegas, Nevada

Attorneys for Appellee

Cases

	Page
Ah Fook Chang v. United States 91 F. 2d 805 (9th Cir. 1937)	2
Duncan v. United States 48 F.2d 128, cert. den. 283 U.S. (9th Cir. 1931)	5,6,7,8,9
Ginzburg v. United States 383 U.S. 463 (1966)	6,10
Mishkin v. New York 383 U.S. 502 (1966)	7,10
Roth v. United States 354 U.S. 476 (1957)	6,9
Swearingen v. United States 161 U.S. 446, 40 L. Ed. 765 (1896) . .	4,6
United States v. Fuller 202 F. Supp. 356 (N.D. Cal. 1962) . .	3
United States v. Limehouse 285 U.S. 424 (1932)	6,7,8,9
United States v. Sugden 226 F.2d 281 (9th Cir. 1955)	3

STATUTES

	Page
Title 18, United States Code, Section 1464	2,3,4,5,7,8

On Thursday, June 30, 1966, oral arguments were heard in this appeal before Judges Hamlin, Browning and Koelsch. At the conclusion of the Appellee's argument Government counsel was requested to file a supplementary brief explaining the position adopted in the Appellee's oral presentation.

Initially, with regard to the communications from the trial judge to the jury outside the defendant's presence, it is the Government's position that the first note denying the jury the use of a dictionary neither added nor detracted from the instructions given in open court and thus the record affirmatively establishes that the Appellant was not prejudiced thereby (R.15)[1]. However with regard to the second note instructing the jury to disregard the defendant's reasons or motives for using objectionable language (R.16), the Government cannot contend that lack of prejudice is affirmatively demonstrated by the record. Under applicable precedents, the validity of which the

---

[1] "R" as used herein refers to the Record on Appeal.

Government does not dispute, such as Ah Fook Chang v. United States, 91 F.2d 805 (9th Cir. 1937) prejudice can be presumed and a reversal of the conviction ordered.

Assuming that Appellant's conviction may be reversed, the next question is whether the granting of a new trial is proper or whether the case should be remanded with instructions to dismiss the indictment. In this connection the principal issues are whether the applicable statute, Title 18, United States Code, Section 1464, is unconstitutional as Appellant claims, and whether the language described in the trial transcript (T. 11,12,23,34,35,48,54)[2] can be said to be obscene, indecent or profane.

With regard to the first point, i.e. whether Section 1464 of Title 18 unconstitutionally encroaches upon the powers reserved to the states under the Tenth Amendment, the Appellee's Answering Brief sets forth numerous and what are felt to be convincing

---

[2] "T" as used herein refers to the Reporter's Transcript of Proceedings.

authorities which establish congressional power over the type of broadcast involved here, e.g. United States v. Sugden, 226 F. 2d 281 (9th Cir. 1955), affirmed per curiam 351 U.S. 916; United States v. Fuller, 202 F. Supp. 356 (N.D. Cal. 1962). Moreover the record below demonstrates the logic of federal regulation of these broadcasts, as there is ample testimony that they could be picked up on receiving sets at distances of from sixty to seventy miles (T.28), eighty to ninety miles (T.90), and even up to four or five thousand miles (T.89) under exceptional circumstances. Obviously such far-reaching broadcasts can interfere with and be a burden on communications in other states and across state lines, and therefore are reasonably within the interstate commerce powers of the Congress.

Assuming that Section 1464 of Title 18 is in fact constitutional a more complex question arises -- whether the language described in the transcript can be said to be obscene, indecent or profane within

the meaning of Section 1464. Obviously enough, if that language cannot be said as a matter of law to violate any of the terms of Section 1464 then the indictment should be dismissed. However the Government believes that this language does violate the statute and that a new trial is proper. Section 1464 of Title 18 provides that:

> "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

In 1896 the case of Swearingen v. United States, 161 U.S. 446, was decided by the Supreme Court, which held that the term obscene as used in a postal obscenity statute prohibiting the mailing of "every obscene, lewd or lascivious book, pamphlet, picture, paper, writing or other publication of an indecent character . . ." (161 U.S. 446 at 449)

necessarily required a lust inciting element, and that vulgarity could not be obscene unless sexually corrupting (161 U.S. at 450-451).

In 1931 the Ninth Circuit, in the case of Duncan v. United States, 48 F.2d 128, cert. den. 283 U.S. 863 (9th Cir. 1931) construed the predecessor statute to Section 1464 of Title 18, which was then Section 109 of Title 47, and which provided that:

> " . . . No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communications."

The Court in Duncan held that the statute proscribed only profane or lust inciting language, and that the term "indecent" was synonymous with "obscene" and did not apply to offensive language, no matter how coarse, vulgar and indecent in the popular sense of the term, unless it had a tendency to excite passion and to corrupt morals. Since the language invoked in Duncan tended to excite anger and to defame,

rather than to arouse feelings of a lascivious nature, it was held not to be obscene or indecent.

One year after the Duncan case the Supreme Court decided United States v. Limehouse, 285 U.S. 424 (1932) which held the term "filthy" under the postal obscenity statute prohibiting the mailing of "every obscene,lewd, or lascivious, and every filthy book . . . or other publication of an indecent character" included crude, vulgar and offensive sexual terminology even though it had no lust inciting effect.

Referring to the broadcasts involved in this present case, it is obvious that the language would tend to excite anger and disgust rather than lust, and under the ruling in Duncan v. United States, supra, would therefore be neither obscene nor indecent. Admittedly the Swearingen decision and the more recent cases of Roth v. United States, 354 U.S. 476 (1957); Ginzburg v. United States, 383 U.S. 463 (1966); and

Mishkin v. New York, 383 U.S. 502 (1966) do effectively restrict the meaning of obscene to "lascivious" or "lust inciting". However in view of the Limehouse decision cited above, which permitted punishment for non-obscene filth, and considering the necessity of controlling the type of foul and offensive broadcasts involved in this case, it would seem that a reappraisal of the Duncan decision would be timely and proper.

It is the Government's position that the Duncan decision wrongly equated "indecent" with "obscene" and thereby unduly restricted the application of Section 1464 in a manner inconsistent with the plain meaning of that statute. Section 1464 clearly was not intended to reach only lascivious or lust inciting language, for it identifies three categories of objectionable material, each separately punctuated, i.e. " . . . any obscene, indecent, or profane language . . .". Obviously the category of

profane language is not synonymous in common understanding with that of obscenity and has never been so considered under Section 1464, e.g. Duncan v. United States, supra. Similarly indecent language has a broader meaning in common language than does obscene, and to arbitrarily equate indecent with obscene, as did the Duncan case, is a needless and improper emasculation of Section 1464, which was intended, in the Government's opinion, to punish all three categories of objectionable broadcasts -- the profane, the obscene and the indecent. As indicated in United States v. Limehouse, supra, there is a type of filthy language which can be subject to criminal sanctions - the sexually coarse, vulgar, disgusting and indecent which goes well beyond the community's sense of sexual propriety. The language broadcast by the Appellant here and overheard by a family-type listening audience was unquestionably "filthy", and in order to give real

meaning to the term "indecent" in Section 1464 the Government urges this Court to now define "indecent" as including the extremely vulgar, coarse and offensive use of sexual terminology in a manner far exceeding the bounds of common decency, i.e. as the equivalent of "filthy" as defined in Limehouse rather than of "obscene" as defined in Duncan.

Some discussion was also had during the course of the Government's oral argument concerning the propriety of the instructions defining obscenity and directing the jury not to consider the defendant's motives or reasons for the use of offensive language. As pointed out by the members of the Court during argument, the instruction which defined obscenity by paraphrasing the definition thereof found in Roth v. United States, supra, might have prejudiced the defendant because it omitted the "dominant theme" requirement of Roth (354 U.S. 476 at 489). With

regard to the instruction that the jury not consider the defendant's motives or reasons for using offensive language it would appear that under the recent decisions in Ginzburg v. United States and Mishkin v. New York, supra, such an instruction would not be proper on retrial inasmuch as those authorities consider the defendant's motives as bearing on the question of obscenity. However it is probable that neither of these problems will arise at a retrial, at which it is anticipated the Government will rely upon the indecent character of the broadcasts rather than upon their obscenity.

Respectfully submitted,

JOSEPH L. WARD
United States Attorney

Michael DeFeo

MICHAEL DeFEO
Special Assistant United States Attorney